

Separation Anxiety: Free Exercise Versus Equal Protection

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Among the most fascinating and difficult constitutional questions are those which involve conflicts of values underlying the religion clauses of the first amendment¹ and the equal protection clause of the fourteenth amendment.² At this writing one such case, pending before the Supreme Court, can have no really satisfactory resolution for those concerned about constitutional liberties, including this writer.

What follows is a view of the controversy surrounding the *Dayton Christian Schools*³ case, focusing primarily upon some of the aspects of the free exercise of religion issue⁴ as it collides with the fourteenth amendment values in Ohio's laws that prohibit discrimination in employment. This Article will examine those sections of Ohio's antidiscrimination laws that appear to permit no exception for religious or other forms of discrimination in religious institutions. The Article will consider whether there must be exceptions and, if so, on what bases should they be created. Profound questions are raised by *Dayton Christian Schools*. First, it must be determined whether, or under what conditions, a state may prohibit a nonpublic elementary and secondary school which maintains a pervasively religious atmosphere for the inculcation of its students from applying a religious test for its teaching staff. Second, if a religious test is constitutionally protected, then it must be determined whether the test may (1) discriminate on the basis of gender and (2) include within it a proscription on recourse to governmental authority.

The problem of discrimination based on truly held religious views may not trouble those who make no distinction between various categories of non-rational discrimination. But, for those for whom the concept of separation of church and state on the one hand and a national commitment to equal protection of the laws on the other both play a significant role in their scheme of things, the resolution of these issues creates a real "separation anxiety."

In attempting to deal with the dilemma, Part I will give a background of the controversy and a view of the pervasively sectarian nature of the school. Part II will consider the special problem of the chain of command religious doctrine and its

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1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U.S. CONST. amend. I.

2. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

3. Ohio Civil Rights Comm'n v. Dayton Christian Schools, 766 F.2d 932 (6th Cir. 1985), *appeal granted*, 106 S. Ct. 2718 (1986). As this symposium went to press, the case was decided by the Supreme Court. See *infra* note 127.

4. While establishment clause issues also formed a basis for the decisions of the district and circuit courts in this case, they are used herein primarily to facilitate a free exercise analysis.

potential for ousting people from access to remedies. Part III will examine the apparently absolute language of the Ohio civil rights statutes, related federal laws, and the role of the federal and state courts in interpretation, abstention, and preemption. Part IV will suggest the most appropriate interpretation of the Ohio statutes. And, Part V will conclude by recommending a mode of analysis that would expand the ecclesiastical exemption from civil rights laws to include most, if not all, teachers in religiously operated and oriented elementary and secondary schools but limit other staff exemptions to those schools that do not receive public assistance.

I. PROPAGATION: OF A CHILD, OF A FAITH, AND OF THE CONTROVERSY

In January 1979 Linda Hoskinson, a teacher at Dayton Christian Schools (DCS),⁵ informed Principal James Rakestraw that she was pregnant. Rakestraw then took the matter up with DCS Superintendent Claude Schindler, who directed Rakestraw to notify Hoskinson that she would not be given a contract for the next academic year "because of our desire to have a mother home with pre-school age children."⁶ Rakestraw responded in late February⁷ in writing that:

[A]s you will be a new parent (June) your teaching next year would be in contrast to the School's philosophy. As a school, we see the importance of the mother in the home during the early years of child growth. This is a factor we consider as we interview prospective teachers. If there are pre-school age children in the home we recommend the mother stay there and do not accept her application.⁸

DCS concedes it "had not adequately explained" its philosophy on this point. Indeed, in testimony the superintendent acknowledged this and concluded that the DCS faculty and staff, including Hoskinson, were "not fully aware of the convictions of the administration and of the School Board relative to this particular Biblical principle." But, he said, the policy of the school had been consistent "since its inception," and he acknowledged having applied that policy in the past.⁹

5. Dayton Christian Schools, Inc., is a nonprofit corporation that operates elementary and secondary school facilities in Montgomery County, Ohio.

6. *Dayton Christian Schools v. Ohio Civil Rights Comm'n*, 578 F. Supp. 1004, 1011 (S.D. Ohio 1984). The sexist, by many current standards, tone of some of the scriptures cited by DCS is apparent. See, e.g. *1 Peter* 3:1 (King James): "Likewise, ye wives, *be* in subjection to your own husbands; that, if any obey not the word, they also may without the word be won by the conversation of the wives."; *1 Timothy* 2:9-15 (King James):

In like manner also, that women adorn themselves in modest apparel, with shame facedness and sobriety; not with braided hair, or gold, or pearls, or costly array; But (which becometh women professing Godliness) with good works. Let the woman learn in silence with all subjection. But I suffer not a woman to teach, nor to usurp authority over the man, but to be in silence. For Adam was first formed, then Eve. . . . She shall be saved in childbearing, if they continue in faith and charity and holiness with sobriety.

However, the scripture most relevant to the duty of women to be at home with their children seems to be in *Titus* 2:1, 4-15 (King James): "But speak thou the things which become sound doctrine: . . . That they may teach the young women to . . . love their husbands, to love their children, To be discreet, chaste, keepers at home . . ."

7. The District Court says the memorandum was received by Hoskinson "on or about February 20," 578 F. Supp. 1004, 1012, and it has become known as the "February 20, 1979" memo or letter. 766 F.2d 932, 934 (6th Cir. 1985).

8. 578 F. Supp. 1004, 1012.

9. *Id.* Counsel for the Commission has indicated that while the school had no written policy other than general reference to scripture, she (counsel) is aware of no instance, before or since this litigation, where the school has permitted a woman with young children to be a full time teacher, although it may have permitted such a woman on a part time basis. Interview with Kathleen McManus, Deputy Chief Counsel to the Attorney General of Ohio, in Columbus (Apr. 16, 1986).

Based on all of the evidence before it, the district court rejected the Commission's contention that the duty of a mother to stay at home to raise her children was the mere "personal philosophy" of the superintendent "simply because the belief might not have been a clearly articulated tenet at DCS." Furthermore, the court made a specific finding that Schindler's "initial decision not to renew Mrs. Hoskinson's teaching contract was founded on religious precepts and therefore falls within the ambit of the first amendment's protection afforded to the free exercise of religion."¹⁰ The court noted that intrafaith differences are common in many religions, and it found "deficient" the notion that "only those practices based upon articulated, agreed upon, and well established religious beliefs of the institution should receive first amendment protection."¹¹ Throughout the litigation, the plaintiffs have maintained that this is institutional doctrine based on scripture.¹²

After receiving the February 20 memorandum, Hoskinson and her husband consulted with an attorney who wrote to the superintendent concerning this apparently discriminatory practice. The letter advised that

[t]o preclude my client from further employment on the basis of pregnancy and child rearing constitutes violation of both state and federal discrimination laws . . . should you not extend further employment to her on the basis of pregnancy, we will have no alternative but to explore all state and federal administrative and court remedies.¹³

On March 14, 1979, the superintendent and the principal met with Hoskinson and suspended her then and there, as the district court found, "because she had gone to an attorney."¹⁴ That, said the school officials, violated the biblical chain of command, adherence to which was a specific requirement of her contract with the school.¹⁵

10. 578 F. Supp. 1004, 1031.

11. *Id.*

12. See, for example, Appellees' Motion to Dismiss or Affirm at 3, *Dayton Christian Schools v. Ohio Civil Rights Comm'n*, 766 F.2d 932 (6th Cir. 1985).

13. 578 F. Supp. 1004, 1012.

14. *Id.* Despite the lower courts' conclusions on the dual reasons underlying the dismissal of Hoskinson, in argument before the Supreme Court, the school cast the chain of command principle in a different light:

I think that is a conciliation procedure which was used here, was used then repeatedly in the present circumstances, and she was not fired because she was pregnant. She was not fired because she went to a lawyer. In each case the school said, come back and let's talk about this. Let's see if we can't become reconciled. And it is only at the end of that process, when on the advice of her attorney she refuses to participate in that proceeding, that she is finally told, as the school told her, we can no longer walk together. In other words, at that point, she is terminated.

I think that another aspect of her commitment is the fact that she signed a contract in which she pledged her adherence to all the beliefs of the school, and she was hired on the basis of that commitment. Her religious representations caused her to get the job. Those are very extensive religious requirements of which she was aware.

Official Transcript, Proceedings Before the Supreme Court of the United States, Case No. 85-488, at 43 (Mar. 26, 1986).

15. *Matthew* 18:15-17 (King James): "Moreover if thy brother shall trespass against thee, go and tell him his fault between thee and him alone; if he shall hear thee, thou hast gained thy brother. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established. And if he shall neglect to hear them, tell it unto the church: but if he neglect to hear the church, let him be unto thee as an heathen man and a publican." *Galatians* 6:1 (King James): "Brethren, if a man be overtaken in a fault, ye which are spiritual, restore such an one in the spirit of meekness; considering thyself, lest thou also be tempted." As the district court noted, Hoskinson was aware of the Biblical Chain of Command. On the employment application which she filled out was a question "As a teacher in a Christian School, on what basis would you require obedience of your students?" The reply, in her own handwriting, was: "Obedience to those in authority over you is clearly stated in the Bible. I believe in God's Chain of

The next day Hoskinson met with the DCS Board, at which time her pregnancy was discussed. On March 26, at a meeting at which she was not present, the Board decided to discharge her. The following day, March 27, a letter was sent to Hoskinson, rescinding the memorandum of February 20¹⁶ but discharging her due to "a serious philosophical difference" with particular reference to her violation of Paragraph 13 of the contract (the Chain of Command principle).¹⁷ On March 28 Hoskinson filed a Charge of Discrimination with the Ohio Civil Rights Commission (OCRC), claiming sex discrimination because of the nonrenewal due to pregnancy and retaliatory dismissal for having consulted a lawyer.¹⁸

The filing set in motion, in April and May of 1979 a series of traditional procedures of the OCRC. These included launching a preliminary inquiry, a suggestion that DCS consider "adjustment of the matter," additional prodding for adjustment, and notice that a formal investigation would ensue from failure to adjust. In October the OCRC presented to DCS counsel a fairly standard but lengthy list of information that OCRC wanted for an investigative conference in November, as well as a notice that it wished to interview certain school officials. The list sought complete information from January 1, 1977 to October 29, 1979 on the following: employment data on Hoskinson; current employee handbooks and rules; written DCS policies governing discipline, discharge, pregnancy, oral or written performance evaluations and standards, employees working with preschool children, contract renewals, grievance procedures, employee resort to the legal system, determinations of "serious philosophical differences," and inquiries into employees' financial status and babysitting plans; job descriptions and model contracts; employee pregnancy and any change of status and reasons therefore; and suspension and discharge records. In addition, the OCRC asked for current employment application forms; a written position statement regarding Hoskinson's allegations; minutes of the March 15 and 26, 1979 meetings of the DCS Board of Directors, and the complete personnel files of Hoskinson and other DCS employees.¹⁹

In January 1980 the OCRC told DCS counsel that it was probable that DCS had engaged in unlawful discriminatory practices and it proposed a conciliation agreement. *Inter alia*, the Commission found:

Evidence and testimony indicate that but for the fact that Complainant is female and selected to have a child, she would have been offered a teaching contract for the 1979-1980 school year. Evidence and testimony also indicate that Complainant's discharge, and the reasons

Command." 578 F. Supp. 1004, 1012. Subsequently, she also personally initialed paragraph 13 of her employment contract which read: "The Teacher agrees to follow the Biblical pattern of *Matthew* 18:15-17 and *Galatians* 6:1 and always give a good report. All differences are to be resolved by using Biblical principles—always presenting a united front." 578 F. Supp. 1004, 1013; 766 F.2d 932, 940. The district court noted that Hoskinson had admitted in her own testimony that she was aware that the chain of command requires one Christian not to take another Christian to law; the court also found that on an earlier occasion (in 1977) she had failed to adhere to the principle, was warned, and had faced possible discharge, but was rehired. 578 F. Supp. 1004, 1013.

16. See *supra* notes 7-8 and accompanying text.

17. 578 F. Supp. 1004, 1013. In addition, article 8, § 4 of the Constitution of Dayton Christian Schools, Inc., states "the Board of Directors shall have the right to dismiss any employee . . . whose personal life or instruction conflicts with the basis and purposes of the corporation . . ." *Id.* at 1011 n.4.

18. *Id.* at 1014.

19. *Id.*

given for it by Respondent, were directly linked to the February 20, 1979 memo which stated that she would not be offered a contract because "[i]f there are pre-school age children in the home we recommend the mother stay there and do not accept her application." Evidence and testimony indicate the Complainant would not have been thus treated had she been a male, and that, therefore, she has been discriminated against because of her sex.²⁰

DCS did not appear at a conciliation conference and had declined to respond to or sign the proposed Conciliation Agreement which, in addition to requiring reinstatement with back pay and prohibition against retaliation against Hoskinson, also required the school to "implement and administer the policies and work rules of the school equally without regard for employees' . . . sex [or] religion . . ." ²¹ After DCS failed to sign the proposed Conciliation Agreement and Consent Order or to present a counterproposal, the Commission filed formal charges in April 1980 to initiate administrative hearings on both the sex discrimination and retaliatory dismissal issues. DCS answered in May. An August hearing date was postponed, and DCS filed suit in United States District Court for the Southern District of Ohio, at Dayton, a week before the rescheduled hearing, then set for October 8, 1980.²²

The federal complaint, under 42 U.S.C. § 1983, sought declaratory and injunctive relief from application of the Ohio civil rights statutory procedures²³ to

20. *Id.* at 1015.

21. Some of the other provisions required that:

E. Respondent will not discharge Complainant without just cause. Respondent will submit to the North Southwest Regional Office of the Commission, copies of any warnings or reprimands given to Complainant during the next one (1) year, and will also notify said office if Complainant is discharged for any reason within the period of one (1) year.

F. Respondent agrees to implement and administer the policies and work rules of the school equally without regard for the employees' handicap, race, sex, religion, age, color, national origin or ancestry.

G. Respondent shall post in a conspicuous place or places on its premises, the Commission's mandatory notice which sets forth excerpts of Chapter 4112, Ohio Revised Code, and other relevant information.

H. Respondent shall not seek information regarding race, color, religion, age, sex, national origin, handicap or ancestry on its form of application, unless a bona fide occupational qualification is certified in advance by the Commission.

I. Respondent shall make clear in its employment contracts that employees may contact the Commission if they believe they are being discriminated against at any time because of handicap, race, sex, religion, age, color, national origin or ancestry.

J. Respondent agrees to establish specific guidelines for employee pregnancy and home child care, to notify all employees in writing of this policy, and to furnish the Commission's North Southwest Regional Office, within sixty (60) days from the date of ratification of this agreement, proof of compliance with this provision.

K. Not later than thirty (30) days after the effective date of this conciliation agreement and consent order, an authorized officer of the designated Respondent will furnish the North Southwest Regional Office of the Commission a certified check, made to the order of Complainant, for the full amount of back pay stipulated to in paragraph II(b) *supra*. *Id.* at 1015-16.

22. *Id.* at 1016.

23. OHIO REV. CODE ANN. §§ 4112.01-.99 (Page 1980 & Supp. 1985). *Inter alia*, section 4112.04(B) permits the Commission to:

(2) Initiate and undertake on its own motion investigations of problems of employment discrimination;

(3) Hold hearings, subpoena witnesses, compel their attendance, administer oaths, take the testimony of any person under oath, and require the production for examination of any books and papers relating to any matter under investigation or in question before the commission, and may make rules as to the issuance of subpoenas by individual commissioners.

(a) In conducting a hearing or investigation, the commission shall have access at all reasonable times to premises, records, documents, individuals, and other evidence or possible sources of evidence and may examine, record, and copy such materials and take and record the testimony or statements of such persons as are reasonably necessary for the furtherance of the investigation. In such investigations, the commission shall comply with the fourth amendment to the United States Constitution relating to unreasonable searches and

the employment practices of the Dayton Christian Schools on grounds that the Ohio statutory scheme contravenes the first, ninth, and fourteenth amendments to the Constitution of the United States. The plaintiffs in the case, in addition to DCS, include Patterson Park Church, Christian Tabernacle; DCS Officials; two parents who alleged that the Ohio law "burdens and endangers the ability of parents to choose a religious education for their children;" and a teacher who charged that the state statute "burdens and endangers the opportunity of religious teachers and administrators to carry out their religious vocation in the Christian formation and education of young people."²⁴

The district court on October 6 granted a temporary restraining order preventing the OCRC from conducting a public hearing. By agreement of the parties, a trial on the merits was consolidated with a hearing on the plaintiffs' motion for a permanent injunction.²⁵ That trial was held on December 8, 1980. On January 6, 1984, the court denied the permanent injunction and dismissed the case, holding that the exercise of jurisdiction by the OCRC did not "impermissibly impinge on Plaintiffs' free exercise rights or result in excessive government entanglement in religion."²⁶

In June 1985 a three-judge panel of the United States Court of Appeals reversed,²⁷ holding that the employment discrimination and retaliatory dismissal provisions of the Ohio civil rights statutes constitutionally could not be applied to employment in a religiously permeated school when the challenged practices serve to fulfill the religious mission of the school.²⁸ The State of Ohio appealed to the Supreme Court of the United States, which has accepted the case for appellate review.²⁹

In *Dayton Christian Schools* everyone concedes the predominantly sectarian-fundamentalist Christian—aura of the educational setting. This is apparent from the testimony of the complainant herself, school officials, and the findings of the district court to that effect:

As no contrary evidence was presented by the Defendant as to the religious purpose and mission of the school, the Court concludes that the religious purpose and mission of Dayton Christian Schools, Inc., is for propagation of the Christian beliefs and faith and that this religious orientation is an integral part of the school's philosophy and operation. The

seizures. The commission or a commissioner may issue subpoenas to compel access to or the production of such materials, or the appearance of such persons, and may issue interrogatories to a respondent, to the same extent and subject to the same limitations as would apply if the subpoenas or interrogatories were issued or served in aid of a civil action in a common pleas court. No person shall be compelled to be a witness against himself.

Section 4112.05(G) allows the Commission to "cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such further affirmative or other action as will effectuate the purposes of sections 4112.01 to 4112.08 of the Revised Code, including, but not limited to, hiring, reinstatement, or upgrading of employees with, or without, back pay, admission or restoration to union membership, including a requirement for reports of the manner of compliance."

24. 766 F.2d 932, 935 n.4.

25. 578 F. Supp. 1004, 1008.

26. *Id.* at 1041. The court also held that the Ohio statutes giving the OCRC jurisdiction "are not unconstitutionally overbroad or void for vagueness." *Id.* The district court also granted plaintiffs an injunction pending appeal. *Dayton Christian Schools v. Ohio Civil Rights Comm'n*, 604 F. Supp. 101, 104 (S.D. Ohio 1984).

27. *Dayton Christian Schools v. Ohio Civil Rights Comm'n*, 766 F.2d 932 (6th Cir. 1985).

28. *Id.* at 947 *passim*.

29. 106 S. Ct. 379 (Nov. 12, 1985) (No. 85-488).

aforsaid religious purposes are shown by the evidence to permeate the school's goals, curriculum and administration.³⁰

The pervasive religious atmosphere was evident:

Every aspect of the school's operation is geared toward exposing and educating the students on how to lead a Christian life by understanding what the members consider to be the guidance and direction provided by the Bible. As revealed in the testimony at the hearing on this matter and in the exhibits accepted into evidence, the teachers at DCS are selected because of their ability to blend their avowed religious beliefs into every lesson and school activity. Teachers are required to be born again Christians and to carry with them into their classes the religious fervor and conviction felt necessary to stimulate young minds into accepting Christ as savior. Because of the emphasis placed on the religious education of the students, the school demands that teachers conform both in thought and conduct to the tenets and principles felt essential to leading a Christian life. The belief system espoused by the members of DCS touches every aspect of their life: work, interpersonal relationships, family and recreational activities. Deviation in any way from what is felt to be the proper religious way of life may cast doubt on a teacher's ability to perform his or her critical role and may, therefore, be grounds for dismissal.³¹

These conclusions were unchallenged by the OCRC on appeal before the Court of Appeals for the Sixth Circuit.³² Also unchallenged was the awareness of all concerned of the biblical chain of command doctrine³³ and its implications for employment.³⁴

The underlying complaint—namely, sex discrimination by the nonrenewal of employment contract based upon the school's view that a mother's place is at home with her pre-school age children, and whether a state constitutionally may prohibit a sectarian elementary and secondary school from imposing such a religion-based standard³⁵ upon an employee that the school and the employee conclude is in the role of an exemplar—is at the crux of this case. It is further complicated by the retaliatory dismissal for breaking the religious chain of command.

II. THE CHAIN OF COMMAND: A TIE THAT BLINDS

There has been an aggressive pursuit of the premise that the Supreme Court should dispose of the *Dayton Christian Schools* case on grounds that allowing a religion-based chain of command doctrine to prevail would oust the civil authority of any capacity to make threshold inquiries.³⁶ The Commission and those *amici* in its support maintain that it is inherent in the authority of the state at least to inquire whether the first amendment mandates an exemption of religion from “facially

30. 578 F. Supp. 1004, 1010.

31. *Id.* at 1018–19.

32. 766 F.2d 932, 936 n.6.

33. *See supra* notes 15, 17.

34. *See supra* note 15 regarding Hoskinson's familiarity with the doctrine.

35. *See supra* note 6.

36. The brief of the American Civil Liberties Union and the Women's Legal Defense Fund, *amici curiae* in support of the Civil Rights Commission, is devoted almost solely to that topic, as is a small portion of the brief of American Jewish Congress, *amicus curiae*, urging affirmance in part and reversal in part. On the other hand, the potential for extensive and perhaps unconstitutional entanglement is evident from the procedures outlined in Parts I and III. *See supra* notes 19–23 and accompanying text and *infra* notes 77–83 and accompanying text.

neutral" governmental regulations of general applicability that serve compelling governmental interests. Closely related to this issue of jurisdiction to inquire is the importance of the state's interest in protecting an employee from retaliation for consulting with counsel or for filing a complaint with the appropriate authorities.

DCS has suggested that the chain of command as a valid basis for retaliatory dismissal should await the determination of the merits of the underlying religious claim—that one who has agreed to abide by the chain of command and breaks the agreement may have to run the risk, on a case-by-case basis, in which the courts would still be the ultimate arbiter. Unfortunately, this approach places upon a complainant the significant burden of the risk of how a court ultimately will rule, and runs contrary to the generally accepted rule protecting good faith complainants from retaliation.³⁷ One need not go so far as to hypothesize that in a school such as DCS, where every employee including custodial personnel has sworn (and perhaps contracted) to the articles of faith, including the chain of command, that if a janitor reports a faulty fire extinguisher to the fire department³⁸ he or she might be subject to dismissal. First, the courts would balance the religious interest with the health and safety interest of young people.³⁹ More significantly, the religious interest itself would be diminished because the janitor may be less likely to be a central exemplar than is a teacher. Still, the possibility that a religious institution (utilizing a chain of command doctrine) may be totally immunized from any secular scrutiny whatsoever creates an agonizing tension between the competing values of the religion clauses of the first amendment and a legitimate state concern for eradicating discrimination—and the complete triumph of either value is unacceptable.

A possible approach for dispensing with the chain of command/retaliatory dismissal on other grounds than whether a claim was filed in good faith is also related to outcome. Should the Court decide that there was no *jurisdiction* over religious elementary and secondary schools or, even more narrowly, over teachers in such schools, the Court then could permit the retaliatory dismissal issue to abide a decision on the jurisdiction question. Thus, the tension between the competing constitutional values could be reduced by allowing a chain of command exemption only to a very narrow category of institutions or certain personnel within those institutions. In the absence of statutory guidance, the exemption could further be narrowed or more clearly defined by a presumption (for or against allowing the exemption) which could include some external indicia, such as whether the institution accepted direct or indirect state or federal aid, whether it claimed and was granted exemption from sales

37. In "[e]very circuit that has considered the issue, opposition activity is protected when it is based on a mistaken good faith belief that Title VII has been violated." *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 385 (10th Cir. 1984). For the Ohio antiretaliation statute, see *infra* note 60 and accompanying text.

38. Brief of American Civil Liberties Union, *supra* note 62, at 42. Curiously, counsel for the School, in responding to questions from the Court in oral argument, answered that the chain of command would be applicable to matters of reporting child abuse, rape, and other crimes. Official Transcript, *supra* note 14, at 36–38, 42. However, obviously aware of this error in failing to distinguish health and safety matters, counsel filed a post-argument brief reversing himself in this area. Post-argument Brief of Dayton Christian Schools, Ohio Civil Rights Comm'n v. Dayton Christian Schools, 766 F.2d 932 (6th Cir. 1985), *appeal granted*, 106 S. Ct. 379 (Nov. 12, 1985) (No. 85–488) 1–7.

39. Including whether fear of dismissal might deter the janitor from reporting if internal administrative efforts did not immediately succeed in having the fire extinguisher repaired or replaced.

or property taxes, or whether it was eligible for and accepted tax-deductible contributions. Other, more subjective indicia, such as centrality-to-the-faith (as in *Wisconsin v. Yoder*⁴⁰) and the religious role of the employee in the institution, are also possible.⁴¹

There is a public policy strongly disfavoring waiver of significant rights.⁴² There is also a constitutionally troubling feature of the chain of command argument, which surfaces in the effects of its successful assertion. Insulating the school from the Ohio Civil Rights Act's antiretaliation provision apparently could prevent secular authorities from reviewing and remedying any kind of wrongdoing, discriminatory or otherwise. Here, if given full weight, this insulation would appear to preclude the courts from making any threshold judgment, even upon jurisdiction over the underlying discrimination claim.

Another approach would be for the courts to put the burden upon the religious institution to take other actions against Hoskinson that would have less drastic impact than ousting the civil authority of jurisdiction—namely, as the Court of Appeals for the Ninth Circuit suggested in *EEOC v. Pacific Press*,⁴³ the imposition of internal religious sanctions for substantial violations of religious principles. That analysis may be unworkable in this case because one of the specific biblical sanctions for breach of chain of command could be a form of excommunication.⁴⁴ But if Hoskinson were to be excommunicated, she no longer would be regarded as of sufficient faith to teach in the religious school, in just the same way as the violation of the chain of command itself rendered her religiously unqualified in the eyes of school officials.

More significant are the arguments that in other cases there could be a proliferation of dubious or even fraudulent claims. But that is not the situation in this case (as both lower courts found), and thus it would be a less appropriate basis for decision.

Even if one concedes the reasonableness of not allowing the chain of command argument to prevail on first amendment grounds over a broader social interest of the state,⁴⁵ that will not dispose of the issue of whether DCS should have been allowed to refuse to renew Hoskinson's teaching contract or required to reinstate her. A resolution of the chain of command issue merely may establish whether she was owed back pay from the point of her precipitous discharge to the end of that school year.

40. 46 U.S. 205 (1972).

41. See, e.g., *NLRB v. Catholic Bishop*, 440 U.S. 490, 501-02 (1979). See also *infra* note 118 and accompanying text.

42. Judicial disfavor of waiver of significant rights is illustrated by *Miranda v. Arizona*, 384 U.S. 436 (1966). The Court stated that "[t]his Court has always set high standards of proof for the waiver of constitutional rights," and "a heavy burden rests on the government to demonstrate that the defendant knowingly and intentionally waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.* at 475.

43. *EEOC v. Pacific Press Publishing*, 676 F.2d 1272, 1281 (9th Cir. 1982).

44. *Matthew* 18:17 (King James) says of those who disregard chain of command, "let him be unto thee as an heathen man and a publican."

45. This would follow a century-old line of cases dealing with such matters as prohibition on polygamy, *Reynolds v. United States*, 98 U.S. 145 (1879), and criminalizing nonpayment of Social Security taxes although payment of the taxes conflicted with the Amish faith, *United States v. Lee*, 455 U.S. 252 (1982).

III. TREATING THE STATUTE AS GOSPEL

Ohio civil rights laws make it an unlawful discriminatory practice for any employer of four or more persons⁴⁶ on account of, *inter alia*, the "religion [or] sex . . . of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly related to employment."⁴⁷ The definition of "sex" clearly includes, "but [is] not limited to, because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions."⁴⁸ Further, women who are affected by pregnancy or childbirth "shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work"⁴⁹

The Ohio scheme creates no religion-based or other exception for acts of employment discrimination based on religion or sex, although it permits inquiries, advertising, and recordkeeping on religion, gender and other bases where an employer asserts "a bona fide occupational qualification certified in advance by the commission"⁵⁰ On its face, then, while the statute permits certain employment related-practices if a bona fide occupational qualification is applied for and certified, the *act* of discriminating in hiring or retention on the basis of religion or sex in a job where there was such a bona fide occupational qualification nevertheless would still appear to be a violation of the plain language of the statute. Both the district court⁵¹ and the court of appeals⁵² adhered to this literal reading (much like a fundamentalist interpretation of the Bible), viewing the language of the statute both in light of the absence of any Ohio legislative history and in the face of a specific exclusion from the fair housing portion of the civil rights act for religious institutions that give housing preference to their coreligionists.⁵³

In its failure to include *any* religious exemption or qualification whatsoever, the Ohio law⁵⁴ clearly is distinguishable from the comparable provisions of federal law. 42 U.S.C. § 2000e-1 of the Civil Rights Act of 1964 provides:

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.⁵⁵

Similarly, 42 U.S.C. § 2000e-2(e)(2) states:

46. OHIO REV. CODE ANN. § 4112.01(A)(2) (Page 1980).

47. OHIO REV. CODE ANN. § 4112.02(A) (Page 1980 & Supp. 1985).

48. OHIO REV. CODE ANN. § 4112.01(B) (Page 1980).

49. *Id.*

50. OHIO REV. CODE ANN. § 4112.02(E) (Page 1980 & Supp. 1985). See *infra* note 80.

51. 578 F. Supp. 1004, 1020.

52. 766 F.2d 932, 940-41 n.16.

53. The fair housing section is OHIO REV. CODE ANN. § 4112.02(H) (Page 1980 & Supp. 1985); the religious exemption to it is contained in section 4112.02(K), but it does not apply to the employment section.

54. The Ohio law, first passed in 1959, antedates the federal civil rights statute, which was enacted in 1964.

55. Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 (1982).

[I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

The Ohio statute also differs from the laws of most other states⁵⁶ which were adopted or modified after the federal Civil Rights Act of 1964.

Chapter 4112 of the Ohio Revised Code sets forth a system of administrative inquiries, hearings, and findings, as well as a resort to Ohio's Courts of Common Pleas for declaratory and injunctive proceedings to enforce, modify, or set aside Commission orders.⁵⁷ However, there is no *de novo* consideration, for the Commission's fact-finding is "conclusive if supported by reliable, probative and substantial evidence on the record"⁵⁸ The act also separately makes it a crime to engage in any unlawful discriminatory practice listed in the substantive sections.⁵⁹ A related provision makes unlawful any act of retaliation because a person "has opposed any unlawful practice defined in this section . . . ,"⁶⁰ but while a retaliatory practice is subject to administrative and civil law remedies, it carries no criminal sanction.

The Commission maintains that the district and appeals courts erred in holding that the Ohio statutory scheme does not give it the authority to create a religious bona fide occupational qualification.⁶¹ Even so, the Commission also asserts that the exemplary function of elementary and secondary teachers is not sufficient to bring them into a purely ecclesiastical role worthy of exemption.⁶²

In the absence of Ohio judicial construction, the district court might have applied abstention here. In oral argument before the Supreme Court, the Commission, in response to questions from the Court, asserted that the *Younger*⁶³ issue was raised before, but not addressed by, the district court.⁶⁴ In an unusual post-argument brief in the Supreme Court, DCS urged that neither *Younger* nor *Pullman*⁶⁵ abstentions were appropriate because the state never disputed jurisdiction⁶⁶ and because the scheme of

56. The court of appeals provides a list in a lengthy note 766 F.2d 932, 941 n.18. A recent example of a broad exemption being upheld is a case in which a teacher of secular subjects in a sectarian school was dismissed purportedly because she was not a follower of the school's religion. A state trial court in California ruled that a blanket exemption from state antidiscrimination laws given to religious employers in California did not violate the establishment clause of the first amendment nor the equal protection clause of the fourteenth amendment. *Bennett v. Department of Fair Employment and Housing*, No. C497 487 (Cal. Super. Ct. Apr. 24, 1986) 6-8 (order denying plaintiff's and granting defendant's motion for summary judgment).

57. OHIO REV. CODE ANN. § 4112.06(A)-.06(B) (Page 1980).

58. OHIO REV. CODE ANN. § 4112.06(E) (Page 1980).

59. Under this section any such discriminatory practice is a misdemeanor of the third degree. OHIO REV. CODE ANN. § 4112.99 (Page 1980).

60. OHIO REV. CODE ANN. § 4112.02(I) (Page 1980 & Supp. 1985).

61. Jurisdictional Statement at 14, n.7.

62. *Id.* at 13 (citing *EEOC v. Mississippi College*, 626 F.2d 477, 485 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981)).

63. *Younger v. Harris*, 401 U.S. 37 (1971).

64. Official Transcript, *supra* note 14, at 7-8.

65. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

66. Post-argument Brief of Dayton Christian Schools, *supra* note 38 at 7.

the act is not subject to any state interpretation that would permit the Commission to find a bona fide occupational qualification.⁶⁷ The prospect of abstention, however, may be very attractive to the Supreme Court, which could remand with an opinion suggestive of guidelines for interpretation.⁶⁸ Furthermore, DCS's argument that the administrative procedures are entangling and that the Ohio processes for appeal of the Commission's administrative proceedings are very limited⁶⁹ are not all that persuasive; Dayton Christian Schools could have filed its section 1983 action in state court.⁷⁰ However, to invoke abstention now when it was not very vigorously contended below could complicate and drag out the already lengthy proceedings,⁷¹ unless very significant guidance is given by the Supreme Court.

As interpreted by both the district court, which upheld the Commission's right to proceed, and the Court of Appeals, which denied that prerogative, the Ohio statutory scheme, unless tortured, could not yield a religious exemption. Both courts declined to stretch it on the rack.

Another possible interpretation is to hold the federal religious exemption pre-empts inconsistent Ohio law and therefore is to be read into the Ohio statute. Clearly, Title VII of the Civil Rights Act of 1964 contemplates parallel federal and state systems for eradicating employment discrimination. Indeed, the federal statute provides for prior resort to available state administrative remedies. However, state laws generally are not pre-empted except where they contravene the purpose of Title VII or "purport to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."⁷² Still, it might not require too much stretching, either through pre-emption by, or through interpretation of the Ohio statutes *in pari materia* with, the religious exemptions of 42 U.S.C. § 2000e-1 and § 2000-2(e)(2)⁷³ to make their inclusion "unlawful employment practices." Indeed, in a related area, the Supreme Court has been very creative in concluding that "the absence of an affirmative intention of Congress fortifies" its conclusion that Congress would not want the NLRB interfering with church-operated schools.⁷⁴ Thus, a court might adopt an analogous approach and conclude that the federal religious exemption pre-empts or modifies a state prohibition which might be lawful under Title VII, and apply the statutory construction scheme of *Catholic Bishop*. A court very concerned with free exercise of religion could determine the

67. *Id.* at 7-11.

68. Colloquy between the Court and counsel for Dayton Christian Schools follow this line of thought. Official Transcript, *supra* note 14, at 26-31.

69. Post-argument Brief of Dayton Christian Schools, *supra* note 38, at 7-11.

70. See *infra* note 88 and accompanying text.

71. See C. WRIGHT, HANDBOOK ON THE LAW OF FEDERAL COURTS §§ 52-52A (3d ed. 1976).

72. 42 U.S.C. § 2000e-7 (1982).

73. The Ohio Supreme Court, for instance, has resorted to federal court interpretation of Title VII definitions to bridge perceived gaps in Ohio civil rights laws. In *Plumbers and Steamfitters Comm. v. Ohio Civil Rights Comm'n*, 66 Ohio St. 2d 192, 421 N.E.2d 128 (1981), the Ohio court noted, "[W]e have determined that federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000e *et seq.*, Title 42, U.S. Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112." *Id.* at 196, 421 N.E.2d, at 131.

74. *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). The *Catholic Bishop* approach to statutory construction focused upon a search for a "clear expression of an affirmative intention of Congress that teachers in church-operated schools . . . be covered under the Act." *Id.* at 504. Noting the absence of such an expression, the Court declined to construe the Act in a manner which would require resolution of difficult constitutional questions. *Id.* at 504-07.

presence of an affirmative exception in Title VII constitutes federal pre-emption and preclusion of state legislation that does not exempt religious institutions from the operation of state civil rights statutes.⁷⁵

Dayton Christian Schools and various *amici*⁷⁶ maintain that taken on its face, the absolute terms of the Ohio statute could lead to prohibiting the Catholic Church from employing only celibate males as priests, barring synagogues from hiring only males who eschew celibacy as rabbis, or striking down all gender-based religious standards. Moreover, the language of the Ohio statute even seems to preclude a *religious* test for such religious positions. Thus, without a constitutionally-imposed or some other limitation, the Catholic Church could not require a priest to be Catholic so long as the person could conduct a mass and perform all other duties. Similarly, the synagogue could not insist that its rabbi be Jewish, if he or she could otherwise perform the duties, and so on. Common sense suggests that the Ohio General Assembly did not intend those results. Even if it did, the first amendment would not permit that level of interference in religiously oriented employment.⁷⁷

The district court noted the problems with the literal reading of the Ohio law. While observing that the ability of religious schools to "actively seek out teachers who are adherents to their religious beliefs" has "almost never been seriously questioned,"⁷⁸ that court expressed its doubt whether the Commission, even by certifying a bona fide occupational qualification, could relieve the school "from the apparent unconditional prohibition contained in subsection (A) against discriminating on the basis of religion in the hiring and firing of employees."⁷⁹ That relief may, however, be a reasonable approach for the United States Supreme Court to adopt.

While the Ohio antidiscrimination statutes do not provide for any religious exemption in religious employment, the provision for employers to have a bona fide occupational qualification certified in advance supports a construction—not relied upon by the district court or the court of appeals—of the statute to permit religious exemptions. The Ohio General Assembly, in providing for the possibility of administrative exemptions from a series of acts regarding recruiting, advertising, and recordkeeping,⁸⁰ could not have intended that such acts incidental to employment be

75. However, four sitting members of the Court, without expressing a conclusion on the first amendment claims in *Catholic Bishop*, found the majority's judicial construction "plainly wrong" and "seemingly invented by the Court for the purpose of deciding this case." 440 U.S. 490, 508 (Brennan, J., dissenting).

76. These amici include, *inter alia*, the American Jewish Congress, the Conference of Seventh Day Adventists, and the United States Catholic Conference.

77. In *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), the Supreme Court came close to adopting a similar view regarding NLRB jurisdiction over sectarian school employment, *see id.* at 498–99, but decided the case instead on what may be at best a very creative construction of a restrained intent of Congress based on a very limited record of that purported intent. The Court noted that a statute "ought not be construed to violate the Constitution if any other possible construction remains available." *See id.* at 500.

78. 578 F. Supp. 1004, 1020.

79. *Id.* at 1020 n.6.

80. OHIO REV. CODE ANN. § 4112.02(E) (Page 1980 & Supp. 1985) makes it unlawful:

(E) Except where based on a bona fide occupational qualification certified in advance by the commission, for any employer, employment agency, or labor organization, prior to employment or admission to membership, to:

(1) Elicit or attempt to elicit any information concerning the race, color, religion, sex, national origin, handicap, age, or ancestry of any applicant for employment or membership;

allowed to occur without there being bona fide occupational qualifications upon which employers could in fact discriminate despite the apparently absolute language of Ohio Revised Code section 4112.02(A). Anything other than such an interpretation makes the reference to bona fide occupational qualification meaningless, and section 4112.02(A) should be read *in pari materia* with section 4112.02(E). Thus, the Ohio Civil Rights Commission would seem to have authority to establish bona fide religious occupational qualifications—although the quality of statutory guidance in determining the standards for such a “certification” is clearly in doubt.

Here, however, the institution did not seek to be certified in advance. Moreover, the Commission apparently does not well regard the school’s claim of Hoskinson’s duty to be at home (even if clearly asserted in advance to her in religious language emanating from the highest source within the sponsoring religious institutions, and even if the school applied for advance certification), although the district court believed that the OCRC would certify adherence to the faith (“co-religion”) as a religious bona fide occupational qualification.⁸¹

Indeed, in oral argument before the Supreme Court, the Commission asserted that, having due regard for the Constitution, it would certify co-religion as a general ecclesiastical bona fide occupational qualification.⁸² However, the Commission was not willing to concede that it would certify as a bona fide occupational qualification the *specific* qualification of being a “good” Christian woman willing to stay home and raise young children. To date, it does not appear that any church or school has ever applied for an exemption based on co-religion as a bona fide occupational qualification, and certainly not for such a specific one.⁸³

IV. SUGGESTED INTERPRETATION

The Ohio Supreme Court has not been heard on the issue of religious exemptions from the civil rights statutes,⁸⁴ but it has not been silent on relieving religious schools

(2) Make or keep a record of the race, color, religion, sex, national origin, handicap, age, or ancestry of any applicant for employment or membership;

(3) Use any form of application for employment, or personnel or membership blank seeking to elicit information regarding race, color, religion, sex, national origin, handicap, age, or ancestry; but an employer holding a contract containing a nondiscrimination clause with the government of the United States, or any department or agency thereof, may require an employee or applicant for employment to furnish documentary proof of United States citizenship and may retain such proof in the employer’s personnel records and may use photographic or fingerprint identification for security purposes;

(4) Print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification, or discrimination, based upon race, color, religion, sex, national origin, handicap, age, or ancestry;

(5) Announce or follow a policy of denying, or limiting, through a quota system or otherwise, employment or membership opportunities of any group because of the race, color, religion, sex, national origin, handicap, age, or ancestry of such group;

(6) Utilize in the recruitment or hiring of persons any employment agency, placement service, training school or center, labor organization, or any other employee-referring source known to discriminate against persons because of their race, color, religion, sex, national origin, handicap, age, or ancestry.

81. 578 F. Supp. 1004, 1020. Query: Is a co-religionist who breaks the faith still a co-religionist?

82. Official transcript, *supra* note 14, at 12.

83. Interview with Kathleen McManus, *supra* note 9.

84. Nor have other Ohio courts addressed the issue.

from another generally applied standard. In *State v. Whisner*⁸⁵ the Ohio Supreme Court dealt with the prosecution of twelve parents for promoting truancy by sending their children to a fundamentalist Christian school in violation of a statute⁸⁶ requiring attendance at schools that conform to minimum state standards. In reversing the convictions and discharging the defendants on grounds that the statute too broadly imposed upon the free exercise clause, the court used language which could have application to DCS:

In our view, these standards are so pervasive and all-encompassing that total compliance with each and every standard by a non-public school would effectively eradicate the distinction between public and non-public education, and thereby deprive these appellants of their traditional interest as parents to direct the upbringing and education of their children.⁸⁷

It would appear that, if confronted by the question whether a religious standard might be applied to the hiring of a teacher in a religious school, the Ohio Supreme Court,⁸⁸ at least in the last decade, would have read in such an exemption.⁸⁹ Indeed, the court, citing the *Pierce* through *Yoder* line of cases,⁹⁰ held that "the right of a parent to guide the education, including the religious education, of his or her children is indeed a 'fundamental right' guaranteed by the due process clause of the Fourteenth Amendment."⁹¹

On the question of whether the state interests were of sufficient magnitude to override free exercise claims, the Ohio court noted that "even if the state can establish the requisite degree of interest, it must yet demonstrate that such interests cannot otherwise be served in order to overbalance legitimate claims to the free exercise of religion."⁹² Even more recently, the Ohio Supreme Court has unanimously reaffirmed its role of special protection of free exercise interests, holding that state-imposed minimum standards may go "no further than necessary to assure the state's legitimate interests in education of children in private elementary schools," noting that "the balance is weighted, *ab initio*, in favor of a First Amendment claim to religious freedom."⁹³

The quest to identify other means of protecting the interests of the state could

85. 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

86. OHIO REV. CODE ANN. § 3321.03 (Page 1980).

87. 47 Ohio St. 2d 181, 211-12, 351 N.E.2d 750, 768.

88. Query whether counsel for Dayton Christian Schools (who also argued for Whisner in the Ohio Supreme Court) should have sought relief in the Ohio courts!

89. In addition to the free exercise clause of the first amendment, the court relied upon article I, § 7 of the Ohio Constitution:

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. . . . Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws, to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

47 Ohio St. 2d 181, 198 n.3, 351 N.E.2d 750, 761 n.3, quoting OHIO CONST. art. I, § 7.

90. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

91. 47 Ohio St. 2d 181, 214, 351 N.E.2d 750, 769.

92. *Id.* at 217, 351 N.E.2d at 771.

93. *State ex rel Nagle v. Olin*, 64 Ohio St. 2d 341, 354-55, 415 N.E.2d 279, 288 (1980).

lead to a decision permitting the institution to discriminate while denying it certain forms of public support, direct or indirect. The record indicates that DCS declines to receive some of the forms of aid that are available in Ohio in the wake of *Wolman v. Walter*,⁹⁴ but that students are transported at public expense to and from the school daily,⁹⁵ pursuant to section 3327.01 of the Ohio Revised Code. Interestingly, the transportation costs are provided to parents with students enrolled in any "school for which the state board of education prescribes minimum standards," pursuant to section 3301.07(D), one of the statutes at issue in the *Whisner* case. Thus, it is clearly possible for the state to apply a less drastic sanction, by adopting a rule denying an affirmative benefit such as busing or parental reimbursement for transportation expenses, or by restricting the availability of tax exemptions by precluding their use to otherwise qualifying institutions which practice forms of discrimination condemned by the state. It is not clear from the record if DCS is eligible for Ohio's intangible property tax exemption,⁹⁶ exemption from certain real property taxes,⁹⁷ or charitable real and tangible personal property tax exemption.⁹⁸ Whether federal income tax deductibility could be denied by the Internal Revenue Service for charitable contributions to DCS would have to abide a determination whether the discrimination involved was contrary to a national policy abolishing sex discrimination under such circumstances, and whether, for example, Title VII would be applicable to DCS.

Using this approach, the state would neither compel DCS to violate its religious precepts by an order to retain Hoskinson on the faculty nor subject it to a criminal sanction for dismissing her, but the public policy of the state could be at least partially vindicated by denying public assistance to the institution. As Chief Justice Burger observed in a recent establishment clause case, the constitution "mandates accommodation, not merely tolerance, of all religions and forbids hostility toward any."⁹⁹ *OCRC v. Dayton Christian Schools* may be a proper case for accommodation and, given *Bob Jones University v. United States*,¹⁰⁰ the denial of tax exemption or other affirmative support is not likely to be construed as forbidden hostility. Indeed, in *Bob Jones*, in upholding an Internal Revenue Service denial of tax-deductibility status to that institution on grounds of racial discrimination, the Court noted that "[o]n occasion this Court has found certain governmental interests so compelling as to allow even regulations prohibiting religiously based conduct."¹⁰¹ Furthermore, "the Government has a fundamental, overriding interest in eradicating racial discrimina-

94. 433 U.S. 229 (1977). Such aid includes textbooks, standardized tests and scoring, medical services, and diagnostic speech, hearing, and psychological services. See OHIO REV. CODE ANN. § 3317.06 (Page 1980).

95. 766 F.2d 932, 955.

96. OHIO REV. CODE ANN. § 5709.04 (Page 1980). This section provides exemption of intangible property belonging to "corporations, trusts, associations, funds, foundations, or community chests, organized and operated exclusively for religious . . . purposes."

97. OHIO REV. CODE ANN. § 5709.07 (Page 1980).

98. OHIO REV. CODE ANN. § 5709.12 (Page 1980).

99. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

100. 461 U.S. 574 (1983).

101. *Id.* at 603.

tion in education”¹⁰² However, the Court also pointed out that “[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.”¹⁰³

V. A MODE OF ANALYSIS

So, it comes back to whether a religiously operated elementary and secondary school should be permitted to select its faculty on religious, albeit sexist, grounds. This in turn ultimately comes down to a question of which social values to accent, which principles to accept and which to reject.

For more than sixty years it has been the law of the land that the free exercise clause of the first amendment protects the traditional parental control of the religious education of their children, to the extent that the state cannot compel their attendance at public schools vis-a-vis church-operated schools.¹⁰⁴ Although the clash between state-imposed values in education and free exercise of religion claims is difficult to resolve, the Supreme Court has held that “[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.”¹⁰⁵

One of the key factors for deciding whether special treatment shall be accorded to religious groups depends upon the nature of the institutions involved. This issue should be resolved, for even if this case is decided in favor of the appellant on some narrow ground, the issue likely will recur. In a future case if not this one, the Supreme Court eventually must determine the existence and scope of an elementary and secondary religious school’s authority to make decisions based upon the religious and moral fitness of its faculty.

The Ohio Civil Rights Commission and others have suggested that significant reliance ought to be given to a Fifth Circuit holding excluding faculty who teach secular subjects in a religiously controlled and operated college from the Title VII religious exemption.¹⁰⁶ That court held:

The College is not a church. The College’s faculty and staff do not function as ministers. The faculty members are not intermediaries between a church and its congregation. They neither attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine. That faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern.¹⁰⁷

Indeed, in *Bob Jones University v. United States*¹⁰⁸ there is a note in which the Supreme Court does make a distinction between churches and schools:

We deal here only with religious *schools*—not churches or other purely religious institutions;

102. *Id.* at 604.

103. *Id.* at 603–04.

104. *Pierce v. Society of Sisters*, 268 U.S. 510, 518–19 (1925).

105. *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

106. *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

107. 626 F.2d 477, 485.

108. 461 U.S. 574 (1983).

here, the governmental interest is in denying public support to racial discrimination in education. As noted earlier, racially discriminatory schools "exer[t] a pervasive influence on the entire educational process," outweighing any public benefit that they might otherwise provide¹⁰⁹

However, the Supreme Court has regularly distinguished the religious nature of elementary and secondary schools on the one hand from that of colleges and universities on the other. For example, in *Lemon v. Kurtzman* the Court struck down as unconstitutional certain forms of public aid to religious elementary and secondary schools, noting that "parochial schools involve substantial religious activity and purpose."¹¹⁰ However, in *Tilton v. Richardson*, decided the same day, the Court upheld different forms of aid to colleges, finding "no basis" for the proposition that religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable.¹¹¹ Likewise, the absence of pervasive sectarianism at colleges was the crux of further decisions upholding revenue bonds for construction¹¹² and noncategorical grants by states.¹¹³

That is not the case, though, in elementary and secondary schools, as the courts below found in this case and as the Supreme Court has noted in its dealings in the last few years with teaching functions in nonpublic elementary and secondary schools. For instance, in distinguishing between state funding of diagnostic staff services (permitted) and state funding of teaching functions (not permitted) the Court drew the line between the former and latter because of the "opportunity for transmission of sectarian views as attends the relationship between teacher and student."¹¹⁴ In *Meek v. Pittenger*,¹¹⁵ the Court rejected state support for remedial teaching because of the possibility "that religious instruction" will become intertwined with secular instruction and because, "whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher."¹¹⁶ These primarily establishment clause cases join with free exercise cases involving parental rights to control primary and secondary education¹¹⁷ and the delicate role of teachers in such schools¹¹⁸ to indicate the Court's special regard and unwillingness to allow broad governmental intrusion into the arena.

Recent decades have witnessed a strong national commitment to eradicate dis-

109. *Id.* at 604 n.29 (emphasis in original), quoting *Norwood v. Harrison*, 413 U.S. 455, 469 (1973).

110. *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971).

111. *Tilton v. Richardson*, 403 U.S. 672, 681 (1971).

112. *Hunt v. McNair*, 413 U.S. 734 (1973).

113. *Roemer v. Board of Public Works*, 426 U.S. 736 (1976).

114. *Wolman v. Walter*, 433 U.S. 229, 244 (1977). Walter is not related to the author!

115. 421 U.S. 349 (1975).

116. *Id.* at 370.

117. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

118. *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). Although the free exercise clause was not the formal basis for striking down NLRB jurisdiction over parochial school teachers, *id.* at 507, it was the pressure of that clause that moved the Court to ferret out the "intent" of Congress to exempt them. *Id.* at 499. See also *supra* note 75 and accompanying text.

crimination based on race, sex,¹¹⁹ and some other grounds. Nonetheless, it is possible to reconcile this commitment with governmental tolerance of some degree of those forms of discrimination in certain circumstances where that discrimination is sincerely believed¹²⁰ to be religiously required. Indeed, such tolerance must be permitted to exist in religious institutions if the free exercise clause of the first amendment is to have any meaning. Still, the issue remains: how much discrimination must be permitted, and on what basis should it be permitted? Several possibilities exist.

The most simple solution might be to exempt all employees of all religious institutions from the statutory requirements. This solution, however, would be far broader than necessary in that it would fail to protect employees of institutions that do not have extensive religion-based employment requirements.

Another possible approach would be to exempt religious institutions in a degree that is inverse to the amount of direct and indirect forms of public aid which flow to them. Since most institutions of their contributors receive some form of tax benefits at the very least,¹²¹ the number of institutions exempted would be small. While this resolution might warm the hearts of those (including the author) dissatisfied with public aid to and tax benefits for these religious institutions, it presents a major problem. Congress and most states already either exempt some categories of religious employment from antidiscrimination statutes or permit bona fide occupational qualifications. This solution might upset the delicate balance, carefully crafted and anchored on well-established public policy in most jurisdictions, that permits institutions to receive tax exemptions while simultaneously retaining certain religion-based exemptions from employment discrimination prohibitions. In spite of this problem, however, a quantum-of-aid test might be a useful ancillary consideration in looking at these cases.

A third approach might be to exempt certain roles within certain religious institutions, namely those with an essentially religious mission. Although defining these roles could be difficult, one possibility is to use a categorical approach such as the exemption of elementary and secondary school staff which the Supreme Court utilized in *NLRB v. Catholic Bishop*.¹²² In the *Dayton Christian Schools* case, the Supreme Court might categorically exempt all aspects of this religious school, relying on dicta in previous cases relating to the pervasive religious atmosphere and the sectarian function and role of teachers in these schools.

The preferable solution would blend the latter two approaches, quantum-of-aid and role exemption. The scope and application of bona fide occupational qualifications applied to teachers, custodial personnel, and others would depend both upon the role played by the employee and upon the extent to which an institution chooses to make itself into a sectarian enclave by declining to accept government aid or benefits. For example, as noted earlier, Ohio pays for transportation of students to schools

119. The nation's failure to adopt the Equal Rights Amendment might suggest some softness in commitment regarding sex! The national commitment to free exercise of religion seems to be strong, and it is clearly older.

120. The "question of sincerity . . . is, of course, a question of fact" *United States v. Seeger*, 380 U.S. 163, 185 (1965).

121. *Walz v. Tax Comm'n*, 397 U.S. 664, 672-73 (1970).

122. 440 U.S. 490 (1979).

which meet certain minimum state standards. Because this aid is not tied to the civil rights statutes, it is not denied to those schools that engage in religious or gender discrimination in any role.

If an exemption is created for certain categories of religious institutions (such as churches and religious elementary and secondary schools), then the threshold question for the Commission is whether the institution falls into one of those categories. If the answer is affirmative, it must then be determined if the scope of the exemption could be narrowed further by a religious role limitation. Both inquiries would involve some entanglement, however minimal. However, if an institution is given the option of helping to define itself for these purposes as an enclave of faith by eschewing certain benefits, that intrusion could be minuscule, avoiding more excessive forms of entanglement.¹²³

In order to avoid governmental intrusion into the religious domain, it is well established that religious discrimination in ecclesiastical positions is permissible even when that discrimination is related to racial associations and is gender based.¹²⁴ Similarly, but not as well established, courts are disinclined to allow some forms of governmental regulation of employment in positions which may not be ecclesiastical but are nonetheless related to the mission of a church or church-related institution.¹²⁵ Where the issue is one of permitting discrimination in favor of co-religionists in teaching and other jobs in schools, the extent of religious permeation of the institution and the age of the subjects of instruction (for example, elementary and secondary school children as opposed to college students) become relevant considerations. Both factors—quantum-of-aid and role exemption—must be contemplated in attempting to reconcile the competing societal and constitutional values involved in this case. On one hand, the first amendment both prohibits governmental interference with religion and mandates the separation of church and state. On the other hand is the current national commitment to eradicate discrimination, which easily could be impaired by government decisions that not only may imply official approval of discrimination but may foster it for yet another generation by permitting it to flourish in the presence of the young. A judicial or

123. Assuming that the free exercise clause mandates bona fide occupational qualifications or categories of exemptions, the court then must provide a mechanism for determining the scope of the role to be played by the Ohio Civil Rights Commission. In the DCS case, the school challenged the Commission's jurisdiction in court late in the process; indeed, more than a year and a half after Hoskinson was told her contract would not be renewed. Perhaps, given the potential for intrusion into the substantial first amendment rights that are at stake, in the face of a claim of constitutional exemption by a religious school, the Commission should be required, if it wishes to proceed, to obtain a "judicial determination of the threshold First Amendment Issues." This type of approach has been suggested by University of Dayton Law Professor Richard Saphire. R. Saphire, Memorandum on the *Dayton Christian Schools* Case (unpublished manuscript, Dec. 1985). It would shift the burden to the Commission rather than requiring the school to file. See *supra* notes 50, 80–83 and accompanying text. This jurisdictional approach would at least minimize the burden on the institution claiming exemption, while acknowledging the possibility of inquiry by the Commission into purported acts of unlawful discrimination.

124. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167–68 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 3333 (1986). And, citing *Rayburn* and *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), the United States Court of Appeals for the Sixth Circuit recently has held that the courts lacked subject matter jurisdiction over a case in which a minister challenged his enforced retirement under church rules. *Hutchison v. Thomas*, No. 85–3051 (6th Cir. Apr. 28, 1986).

125. *NLRB v. Catholic Bishop*, 440 U.S. 490, 501 *passim* (1979).

legislative application of the proposed mode of analysis,¹²⁶ while not resolving the conflict of values at play, at least would serve to narrow the instances of conflict and to give religious institutions some voice in deciding just how much a part of the secular world they are. Likewise, this mode of analysis will not cause claims of religiously motivated retaliatory dismissals to vanish, but it would reduce the potential for such conflict between the competing values of freedom of religion and nondiscrimination.

Even if the Supreme Court affirms the decision of the court of appeals, there remain significant unresolved policy judgments which might be addressed legislatively. If the Court does anything other than affirm, these matters will be dealt with in further administrative or judicial proceedings, or both.¹²⁷ Even so, the egalitarian

126. See, e.g., *Bob Jones University v. United States*, 461 U.S. 574 (1983). In the Dayton Christian Schools case the lower courts found there to be little evidence of public support in the record, but the record was silent on tax exemption and deductibility of contributions benefits.

127. While this Article was at the printer, the Supreme Court of the United States reversed the decision of the United States Court of Appeals for the Sixth Circuit by a nine-to-nothing margin, with two opinions. *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 106 S. Ct. 2718 (1986), reversing and remanding 766 F.2d 932 (2d Cir. 1985). A five-member majority of the Court (per Justice Rehnquist) found attractive the notion that "the District Court should have abstained from adjudicating this case under *Younger* . . ." *Id.* at 2722. See *supra* text accompanying note 68. The Court said that in the wake of its admonition in *Younger* to abstain from enjoining pending state criminal proceedings, it had "since recognized that our concern for comity and federalism is equally applicable to certain other pending state proceedings . . . [including] state administrative proceedings in which important state interests are vindicated so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim." 106 S. Ct. 2718, 2723. It cited "the elimination of prohibited sex discrimination [as] a sufficiently important state interest to bring the present case within the ambit" of this concept. *Id.* As observed *supra* in the text accompanying note 69, the Court deemed dubious the school's contention that a constitutional challenge could not be made in the Commission's administrative proceedings: "[E]ven if Ohio law is such that the Commission may not consider the constitutionality of the statute under which it operates, it would seem an unusual doctrine . . . to say that the Commission could not construe its own statutory mandate in light of federal constitutional principles," 106 S. Ct. 2718, 2724, inviting comparison with the Court's mode of construction in *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). See *supra* note 74 and accompanying text. The majority added that even if the Commission could not consider the constitutionality of the statute, "it is sufficient . . . that constitutional claims may be raised in state court judicial review of the administrative proceeding." 106 S. Ct. 2718, 2724. See *supra* note 88 and text accompanying note 70. In a separate concurrence in the result, four Justices (per Justice Stevens) agreed with the District Court that the potential for coercion by the Commission at the investigatory and hearing stage was speculative, "premature," and "not ripe for review." 106 S. Ct. 2718, 2726. However, the concurrence disagreed with the majority's expansion of the *Younger* abstention doctrine to limit review of even an unconstitutional and coercive order of an administrative agency to the state courts without access to federal judicial relief of federally guaranteed rights. *Id.* n.5.

The Court did not address directly the merits of most of the constitutional claims, but explicit or implicit in its holding are certain conclusions. First, all nine Justices agree that "the Commission violates no constitutional rights by merely investigating the circumstances of Hoskinson's discharge in this case, if only to ascertain whether the ascribed religion-based reason was in fact the reason for the discharge." *Id.* at 2724 and quoted with approval in the concurrence at 2725-26. See *supra* text accompanying note 36. Second, all nine Justices agree that while "religious schools cannot claim to be wholly free from some state regulation," the Commission can and should consider whether any proposed sanction would violate the religion clauses of the first amendment. 106 S. Ct. 2718, 2724, 2726. See *supra* text following note 39. Last, there is passing, and impliedly approving, reference to apparent Commission recognition of some degree of co-religion as a valid basis for employment limitation in sectarian schools. 106 S. Ct. 2718, 2724, 2726. See *supra* text accompanying notes 78, 81-83, 118.

The net result of the Supreme Court's disposition of the case is that the resolution of the free exercise versus equal protection controversy—including any interpretation of the Ohio statute and any application of constitutional principles thereto—is now initially within the province of the Ohio Civil Rights Commission, perhaps eventually in the state courts, and maybe ultimately in the distant future back in the Supreme Court of the United States. The author believes that last prospect is unlikely for reasons set forth in the first two paragraphs of Part IV. See *supra* notes 84-93 and accompanying text. While the school's absolutist position on the chain-of-command claim is not likely to succeed (unless the Ohio courts conclude that the statute does not confer jurisdiction over sectarian school teachers), the long-range prospects are better if the school presses its underlying desire to be able to hire or dismiss based upon the standard of a "good Christian woman" as it finds that to be scripturally defined.

values at stake are incapable of complete accommodation with the free exercise claims. Any purported resolution will be uneasy—and no amount of verbal massage will relieve the constitutional tension.